IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 07..03..2007

C O R A M

The Honourable Mr. A.P. Shah, Chief Justice
and
The Honourable Mr. Justice K. Chandru

Writ Appeal No.1599 of 2006

S. Nalini Srikaran .. Appellant

Versus

Union of India, rep. by its
Ministry of External Affairs,
New Delhi. .. Respondent

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Prayer : Appeal filed under Clause 15 of the Letters Patent against the order of a learned single Judge of this Court dated 31.10.2006 passed in W.P. No.40310 of 2006 presented under article 226 of the Constitution of India to issue a Writ of Mandamus directing the respondent to permit the petitioner's minor dauthter Megara to come to India and stay in India since she is an Indian Citizen untill the Status of her citiship is decided by the Government of India u/s 9(2) of the Indian Citizenship Act 1955.

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For Appellant : Mr. N.G.R. Prasad for
Mr. R. Rajaram

For Respondent : Mr. P. Wilson,
Asst. Solicitor General of India.

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J U D G M E N T

(Delivered by the Hon'ble Chief Justice)

The appellant, Nalini and her husband, Srikaran alias Murugan were arrested in connection with the murder of the former Prime Minister Rajiv Gandhi. While in prison, the appellant gave birth to a female child, Megara on 21.1.1992 in Chengalpattu Medical College Hospital at

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Chengalpattu. Her birth was also registered in Chengalpattu Municipality on 24.1.1992 under the Registration of Births and Deaths Act, 1969. She lived with her mother in the prison. Then in 1998, the Special Court awarded death penalty to all 26 accused, including the appellant and her husband. In view of this precarious situation, the appellant's mother-in-law, a Sri Lanka citizen took minor Megara to Sri Lanka with her. Megara was given an emergency passport by the Sri Lanka Government to travel to Sri Lanka and she continues to stay in Sri Lanka since 1998. In appeal, the appellant's death penalty was converted into life imprisonment and she has been kept in Special Prison for Women at Vellore. It appears that the appellant's daughter applied for permission to travel to India to the Indian High Commission in Sri Lanka on 15.4.2004. Since the Indian High Commissioner did not pass any order on the said application, the appellant filed Writ Petition No.21263 of 2005 before this Court and by order dated 22.9.2005, the respondent - Union of India was directed to consider and pass order on the application of the appellant's daughter, seeking permission to travel to India, within six weeks. The respondent gave permission for the appellant's daughter to travel to India to meet her parents. Thereafter, she went back to Sri Lanka.

2. The present writ petition has been filed by the appellant for a mandamus directing the respondent to grant visa to her daughter Megara to travel to India. The appellant says that the ethnic conflict in Sri Lanka is fast deteriorating and the armed conflict between Sri Lankan Army and ethnic minority Tamil group has worsened. As a result of the continuous fight between the two armed combatants, the schools and colleges in the Tamil areas have been closed. The displaced families are coming in large numbers to India as refugees. The Indian Government is not only accommodating the refugees, but also rehabilitating them in various camps on humanitarian consideration. According to her because of the armed conflict, her daughter's education is also affected and she is unable to go to school for the past one year and her life itself is in danger. Therefore, her daughter has decided to come back to India. The appellant's daughter and mother-in-law applied for visa on 20.5.2006. The Indian High Commission granted visa to the appellant's mother-in-law on 22.5.2006 itself, but no order was passed on the travel permission documents of the appellant's daughter. The appellant says that her daughter is an Indian citizen by virtue of Section 3(b) of the Citizenship Act, 1955 (Act 57 of 1955) and she was forced to go to Sri Lanka when she was only six years old, with the appellant's mother-in-law, because of the factors beyond her control since she had no other option. The appellant is therefore seeking direction to the respondent to grant a visa to her daughter to visit India.

3. While the petition was pending the request of the appellant's

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daughter for issue of visa was came to be rejected by the respondent on the following grounds :

(a) In response to W.P. No.21263 of 2005 filed by S. Nalini Srikaran, she was granted a visa (single-entry, 3-months, tourist visa) by our Mission in Colombo on 22nd December, 2005. Not only did the petitioner travel to Chennai, but also overstayed beyond the period specified in the visa by one month which was then regularized by the Chief Immigration Officer in Chennai; and

(b) With regard to W.P. No.40310 of 2006, the Government have examined the matter and have not recommended the grant of a student visa for a period of one year to the petitioner."

Consequently, the learned single Judge closed the writ petition. It was, however, clarified that if the appellant is entitled to any other remedy in law, the order in the writ petition will not stand in her way. Being aggrieved, the appellant has filed the present appeal.

4. On an application made by the appellant, we permitted her to amend the prayer in the writ petition and the amended prayer reads as follows :

"For the reasons stated in the accompanying affidavit, it is therefore prayed that this Hon'ble Court may be pleased to issue a writ of mandamus directing the respondent to permit the petitioner's minor daughter Megara to come to India and stay in India, since she is an Indian citizen, until the status of her citizenship is decided by the Government of India under Section 9 (2) of the Indian Citizenship Act, 1955 and thus render justice."

5. In response to the notice issued by this Court, the respondent - Union of India filed a counter to the amended petition. It has been pointed out in the counter that the appellant herself has pleaded in the writ petition that her mother-in-law, a Sri Lanka citizen, came from Sri Lanka, got the name of her daughter endorsed in her Sri Lanka passport and took her to Sri Lanka and the child continues to stay in Sri Lanka. When the appellant claims that her daughter is an Indian citizen, there was no necessity for her to seek for a Sri Lanka passport. Once a person voluntarily acquires citizenship of another country, Section 9(1) of the Citizenship Act, 1955 comes into play and she would cease to be a citizen of India. It is contended that the respondent has information that the appellant's daughter has now left for Norway, after obtaining visa from that country, for her studies. It is also contended that under Section 9 (2) of the Citizenship Act read with Rule 30 of the Citizenship Rules, 1956, the appellant has to make an application before the competent authority, namely., the Ministry of Home Affairs of the Government of India, which alone has the power to consider and adjudicate upon the issue relating to citizenship and the appellant cannot seek any relief from this Court under Article 226 of the Constitution and no writ of mandamus could

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be issued even without an application being made to the appropriate authority.

6. Mr. N.G.R. Prasad, learned counsel for the appellant submitted that the appellant's daughter, Megara has acquired Indian citizenship under Section 3(b) of the Citizenship Act, 1955 since the appellant herself is a citizen of India and she would not cease to be a citizen of India, unless there is a determination of the issue of cessation of her citizenship by the Central Government under Section 9(2) of the Citizenship Act, 1955. Learned counsel submitted that the appellant's daughter was hardly six years old when she had gone to Sri Lanka due to compelling circumstances and she could not be said to have voluntarily acquired foreign citizenship. According to him the appellant's daughter, as a citizen of India, is entitled to enter India and live with her parents and the issue of cessation of her citizenship could be decided only after she attains majority.

7. On the other hand, Mr. P. Wilson, learned Assistant Solicitor General submitted that since the appellant's daughter had voluntarily obtained a passport in Sri Lanka claiming herself to be a Sri Lankan citizen, Schedule III, Rule 3 of the Citizenship Rules, 1956 presumes that she has voluntarily acquired Sri Lankan citizenship and in the absence of any application for determination of her citizenship under Section 9 of the Citizenship Act, 1955 read with Rule 30 of the Citizenship Rules, 1956, there is no cause of action for the appellant to approach this Court seeking any relief. According to the learned Assistant Solicitor General, the appellant is estopped from claiming that her daughter is an Indian citizen due to her conduct and voluntary acquisition of citizenship of Sri Lanka.

8. Before adverting to the rival contentions, reference may be made to the relevant provisions in the Statute and the Rules. Section 9 of the Citizenship Act, 1955 provides for termination of citizenship and reads as follows:

> "9. Termination of Citizenship -
>
> (1) Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January 1950 and the commencement of this Act voluntarily acquired the citizenship of another country shall, upon such acquisition or as the case may be, such commencement, cease to be a citizen of India -
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> Provided that nothing in the sub-section shall apply to a citizen of India who, during any war in which India may be engaged, voluntarily acquires the citizenship of another country,

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until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority, in such manner, and having regard to such rules of evidence, as may be prescribed in this behalf."

9. The rule-making power under the said Act is to be found in Section 18 thereof and it is provided that the Central Government may, by notification, make rules to carry out the purposes of this Act; and in particular, under Section 18(2)(h), may make provision in such rules for the authority to determine the question of acquisition of citizenship of another country, the procedure to be followed by such authority and rules of evidence relating to such cases. The necessary rules in exercise of the power conferred by Section 18 of the said Act were framed in 1956, being designated as the Citizenship Rules, 1956, and we are concerned in particular with Rule 30 and Schedule III to the said Rules. Rule 30 provides as follows :

"Rule 30 : Authority to determine acquisition of citizenship of another country -

(1) If any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall for the purposes of Section 9(2) be the Central Government.

(2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III."

10. Paras 1 and 3 of Schedule III may also be set out and they make the following provision :

"1. Where it appears to the Central Government that a citizen of India has voluntarily acquired the citizenship of any other country, it may require him to prove within such period as may be fixed by it in this behalf, that he has not voluntarily acquired the citizenship of that country; and the burden of proving that he has not so acquired such citizenship shall be on him.

2. ....

3. The fact that a citizen of India has obtained on any date a passport from the Government of any other country shall be conclusive proof of his having voluntarily acquired the citizenship of the country before that date."

11. The question whether the minor Megara has ceased to be a citizen of India on acquisition of Sri Lanka passport is required to be determined in the manner provided by the combined operation of all these provisions

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earlier set out above, viz. Section 9 of the Citizenship Act, 1955 and Rule 30 read with Schedule III of the Citizenship Rules, 1956. The question as to proper interpretation of these provisions has arisen before the Supreme Court on a number of occasions, and the question not being res integra, it will be useful to make immediate reference to the judgments of the Supreme Court which were cited at the bar before us.

12. The vires of Para 3 of Schedule III as well as the constitutionality of Section 9(2) of the Act were in question in Izhar Ahmed vs. Union of India, A.I.R. 1962 S.C. 1052, and by a majority decision, the challenge was negatived by the Supreme Court. The majority held that this was a rule of evidence and fell within the scope prescribed by Section 9(2) of the Citizenship Act, and the challenge to its validity on the ground that it was a rule of substantive law had, therefore, to be repelled. Similarly, the challenge to Section 9(2) of the Act on the ground that it enabled the rule-making authority to make a rule to deprive the citizenship rights of citizens was also not sustained. Inasmuch as the validity and the vires of these provisions is not in issue, it is in our opinion unnecessary to refer to this decision in greater detail.

13. The provisions of Section 9(2) of the Citizenship Act, 1955 read with Schedule III to Rule 30 of the Citizenship Rules, 1956 fell for consideration of the Supreme Court in the case of Government of A.P. vs. Mohd. Khan, A.I.R. 1962 S.C. 1778. In that case, the Supreme Court was dealing with writ applications of 22 persons who had come to India from Pakistan on the passport of the Government of Pakistan and were asked to remove themselves from out of India on account thereof. Their being citizens of India at the commencement of the Constitution was not in dispute. The only question was with regard to the effect of their entering India on Pakistan passports. Gajendragadkar, J., as he then was, speaking for the Court, categorically over-ruled the view that possession of such passport operated as automatic cession of the Indian citizenship and observed as follows :

> "That raises the question about the proper order to be passed in the present appeals. It has been urged before us by Mr.Tatachari for the appellant that the effect of our decision in the case of Izhar Ahmad Khan, (AIR 1962 SC 1052), is that as soon as it is shown that a person has acquired a passport from a foreign Government, his citizenship of India automatically comes to an end, and he contends that in such a case, it is not necessary that the Central Government should hold any enquiry and make a finding against the person before the appellant can issue an order of deportation against him. In our opinion, this contention is clearly misconceived. In dealing with the question about the validity of the impugned Section and the Rule, this

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Court has, no doubt, stated that 'the proof of the fact that a passport from a foreign country has been obtained on a certain date conclusively determines the other fact that before that date he has voluntarily acquired the citizenship of that country'. But in appreciating the effect of this observation, it must be borne in mind that in all the cases with which this Court was then dealing, the question about the citizenship of the petitioners had been expressly referred to the Central Government and the Central Government had made its finding on that question. It was after the Central Government had recorded a finding against the petitioners that they had acquired the citizenship of Pakistan that the said writ petitions came before this Court for final disposal and it is in the light of these facts that this Court proceeded to consider the contention about the validity of the impugned section and the impugned rule. It is plain, therefore, that the observations on which Mr.Tatachari relied were not intended to mean that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary enquiry by the Central Government. Indeed, it is clear that in the course of the judgment, this Court has emphasised the fact that the question as to whether a person has lost his citizenship of this country and has acquired the citizenship of a foreign country has to be tried by the Central Government and it is only after the Central Government has decided the point that the State Government can deal with the person as a foreigner. It may be that if a passport from a foreign Government is obtained by a citizen and the case falls under the impugned Rule, the conclusion may follow that he has acquired the citizenship of the foreign country; but that conclusion can be drawn only by the appropriate authority authorised under the Act to enquire into the question. Therefore, there is no doubt that in all cases where action is proposed to be taken against persons residing in this country on the ground that they have acquired the citizenship of a foreign State and have lost in consequence the citizenship of this country, it is essential that that question should be first considered by the Central Government. In dealing with the question, the Central Government would undoubtedly be entitled to give effect to the impugned R.3 in Sch.III and deal with the matter in accordance with the other relevant Rules framed under the Act. The decision of the Central Government about the status of the person is the basis on which any further action can be taken against him.Therefore, we see no substance in the argument that the orders of deportation passed by the

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appellant against the respondents should be sustained even without an enquiry by the Central Government about their status. That is why we think, in substance the direction of the High Court is right, though the High Court was in error in holding that the Central Government should hold the enquiry without reference to Rule 3." (emphasis supplied)

14. In Md. Ayub Khan vs. Commr. of Police, reported in A.I.R. 1965 S.C. 1623, the Supreme Court did not entertain the plea which had been sought to be advanced before it namely., that Izhar Ahmed's case required reconsideration as certain aspects of the question had not been brought to the notice of the Court. The Court, however, construed and interpreted the provisions which are required to be applied by us also namely., Section 9 of the Citizenship Act and Rule 30 and Schedule III of the Citizenship Rules. Md.Ayub Khan's case therefore needs to be considered in some depth. The appellant before the Supreme Court claimed that he had acquired the status of an Indian citizen on the commencement of the Constitution and was served with a notice informing him that as he had obtained Pakistan passport, he should leave India within one month from the date of the service of the notice; and in default of compliance he was threatened with prosecution and deportation under the Foreigners Act, 1946 as amended by the Foreigners Law (Amendment) Act, 1957. On receipt of the notice Md.Ayub Khan applied to the Collector of Madras for registration as a citizen of India. Later on he applied to the Central Government under Section 9(2) of the Citizenship Act for determination of the question whether he continued to remain a citizen of India and prayed that he may be given an opportunity to produce all necessary evidence in support of his claim as regards Indian citizenship. Without affording him that opportunity, however, the Government of India rejected the application of the appellant under Section 9 of the Citizenship Act. He thereupon preferred a petition before the Madras High Court urging, inter alia, that Rule 30 contemplated a quasi-judicial enquiry in which an opportunity must be given to the party sought to be affected to make a representation and to adduce evidence to show that the acquisition of a Pakistan passport was not voluntary. The learned single Judge of the Madras High Court rejected this contention, inter alia, observing that as far as the question of opportunity was concerned the petitioner Md.Ayub Khan, "had not indicated on what points he intended to lead evidence and what kind of evidence he intended to adduce". His appeal to a Division Bench of the Madras High Court was also dismissed holding that Section 9 "laid down an objective test and when the individual had brought himself within it, the law determines the legal consequences of the situation, independently of his intent or understanding". It was accordingly held that there was no scope for enquiry of the nature claimed by the appellant. Allowing the appeal the Supreme Court held that the determination of the question postulates

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an approach as in a quasi judicial enquiry and this requires that the citizen concerned must be given due notice of the nature of the action which in the view of the authority involves termination of Indian citizenship, and reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true. It was further held that the scope and extent of the enquiry to be made by the authority on a plea raised by the citizen concerned should depend upon the circumstances of each case. In paragraphs 10 and 11 of the said judgment the Supreme Court indicated the scope of the enquiry as follows:-

> "Para – 10. Paragraph 1 of Sch.III which raises a rebuttable presumption, when it appears to the Central Government that a citizen has voluntarily acquired foreign citizenship, casts the burden of proof upon the citizen to disprove such acquisition, and Paragraph 2 which authorises the Central Government to make enquiries for the purpose of determining the question raised, strongly support the view that the Central Government must arrive at a decision that the Indian citizen has voluntarily acquired foreign citizenship, before action can be taken against him on the footing that his citizenship is terminated. Paragraph 3 raises a conclusive presumption that a citizen of India who has obtained a passport from a foreign country on any date, has before that date voluntarily acquired citizenship of that other country. By the application of the rule in Paragraph 3 the authority must regard obtaining of a foreign passport on a particular date as conclusive proof that the Indian citizen has voluntarily acquired citizenship of another country before that date. But obtaining of a passport of a foreign country cannot in all cases merely mean receiving the passport. If a plea is raised by the citizen that he had not voluntarily obtained the passport, the citizen must be afforded an opportunity to prove that fact. Cases may be visualized in which on account of force a person may be compelled or on account of fraud or misrepresentation he may be induced, without any intention of renunciation of his Indian citizenship, to obtain a passport from a foreign country. It would be difficult to say that such a passport is one which has been "obtained" within the meaning of Paragraph 3 of Sch.III and that a conclusive presumption must arise that he has acquired voluntarily citizenship of that country.
>
> Para – 11. We are not concerned in this case with the truth or otherwise of the plea raised by the appellant in his petition before the High Court that he was compelled to obtain the passport from the High Commissioner for Pakistan. Balakrishna Ayyar, J., observed that the plea of the appellant was not bona fide. But it is not the function of the Courts to determine the question whether the plea raised is true or not: it is for the

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authority invested with power under S.9(2) to determine that question if it is raised. The High Court in appeal was of the view that S.9 laid down an objective test and once it was found that the passport was obtained in fact by an Indian citizen from another country, the law determined the legal consequences of that conduct and no question of his "intent or understanding arose". We are unable to agree with that view. If voluntary acquisition of citizenship of another country determines Indian citizenship within the meaning of S.9(1), and by virtue of Paragraph 3 of Sch.III of the Citizenship Rules a conclusive presumption of voluntary acquisition of citizenship is to be raised from the obtaining of a passport from the Government of any other country, it would be implicit that the obtaining of a passport was the result of the exercise of free volition by the citizen. This view is strengthened by the scheme of S.9(2) read with R.30 which contemplates an enquiry by an authority prescribed under sub-S.(2) for determination of the question whether citizenship of another country has been acquired by an Indian citizen." (emphasis supplied)

15. In State of U.P. Vs. Rahmatullah reported in A.I.R. 1971 S.C. 1382, the Supreme Court was concerned with an appeal by the State against the acquittal by the High Court of the respondent-accused who was tried for an offence under Section 14 of the Foreigners Act, 1946 on the ground of his having entered India on 1.4.1955 on a Pakistan passport and having overstayed in India illegally. The fact that he was a citizen of India at the commencement of the Constitution was not disputed. During the pendency of the criminal proceedings, an enquiry under Section 9(2) of the Citizenship Act read with Rule 30 of the Rules thereunder was held and by the order of the Central Government, he was held to have acquired the citizenship of Pakistan after 26th January, 1950 and before 15th March, 1955. Rahmatullah's acquittal by the High Court was based on the fact that the question of his acquisition of Pakistani citizenship was not determined before the date of the prosecution. Dua, J., speaking for the Court, after referring to some reported and unreported judgments, made the following observations :

> "In view of these decisions, it seems to us to be obvious that till the Central Government determined the question of the respondent having acquired Pakistan nationality and had thereby lost Indian nationality, he could not be treated as a foreigner and no penal action could be taken against him on the basis of his status as a foreigner, being a national of Pakistan." (emphasis supplied)

16. A plain reading of the ratio laid down in the above judgments

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implicitly spells out that only an order passed by the Central Government under Section 9(2) of the Citizenship Act which operates cession of the citizenship of a person and not his acquisition of the passport of a foreign country, notwithstanding the conclusive presumption raised under the Rules. In other words a person found to be a citizen of India cannot be treated as foreigner as long as the Central Government does not record a decision to that effect under Section 9(2) of the Citizenship Act. We hasten to add that Section 9(2) does not provide for filing of any application by such person as suggested by the learned Assistant Solicitor General, but what the Section contemplates is the determination of the question of cessation of citizenship by the Central Government and only upon such determination he would be ceased to be citizen of India. Further, the provision for prescribing rules of evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry as to whether the citizen concerned has obtained a passport of another country. The authority has also to determine as to whether the person has voluntarily acquired foreign citizenship. The enquiry would be quasi judicial in nature and reasonable opportunity must be afforded to the citizen to convince the authority that what is alleged against him is not true. Thus, the termination of Indian citizenship does not merely depend upon the action of a foreign country in issuing a passport.

17. Learned Assistant Solicitor General sought to place reliance on the decisions of the Supreme Court in Syed Khwaja Moinuddin Vs. Govt. of India, AIR 1967 SC 1143 and Mohd. Ilyas Vs. Union of India, 1970 (3) SCC 61 in order to contend that an irrebutable presumption is raised under the Citizenship Rules that acquisition of passport of a foreign country by a person would amount to cession of Indian citizenship and no enquiry would be necessary under Section 9(2) of the Citizenship Act. We are afraid that the submission of learned Assistant Solicitor General is not well founded. In the first case, the appellant Syed Khwaja Moinuddin, who was born in India in 1938, went to Pakistan after the Partition, where he stayed until 1955. In the year 1955, he returned to India on a passport obtained from the Pakistan Government as a Pakistan citizen with a visa from the Indian Government. Even after the expiry of the visa, he continued to stay in India, but in August, 1963, he was deported to Pakistan. He once again came to India with a passport issued by the Pakistan Government with a visa from the Indian High Commission and arrived in India in the year 1964. Subsequently, the question of deportation of the appellant by the Indian Government arose, and thereupon, the appellant filed a petition under Article 226 of the Constitution challenging the order of deportation made by the Government of India. The petition was allowed by the High Court of Andhra Pradesh and the order of deportation was quashed on the

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ground that there had been no determination by the Indian Government under Section 9 of the Citizenship Act, 1955 that the appellant had acquired Pakistan citizenship. Thereafter, the Government took up the question of determining the nationality of the appellant, and a notice was issued to the appellant, pursuant to which the appellant made a representation to the Central Government and finally, the Government issued an order holding that the appellant had voluntarily acquired the citizenship of Pakistan. This order was challenged on behalf of the appellant on the ground that he was not given adequate opportunity of putting forward his case before the Government of India gave its decision and it was urged that the Government of India should have held an enquiry before arriving at this decision and for this proposition, reliance was placed on a decision in Md.. Ayub Khan vs. Commr. of Police (cited supra). The Supreme Court rejected the contention holding that though the appellant made two representations, he did not, at any stage, raise any plea that he had not voluntarily acquired the passport on the basis of which he came to India on the two occasions in 1955 and 1964. In fact, though the appellant did not put forward a plea that when he went to Pakistan, he was a minor, it was never urged on his behalf that he had not gone to Pakistan voluntarily, or that he had left because he was compelled by the disturbed conditions in India, or that he was taken there by abduction or against his will. In fact, he did not indicate in his representation at all the reason why he had gone to Pakistan. It was found that even after arriving in Pakistan, he stayed on for a period of four years, and in the representation to the Government, he did not explain this long stay there. There was no plea that he was compelled to apply for the passport as a Pakistan citizen and did not, in fact, obtain it voluntarily. In our opinion, Khwaja Moinuddin's case does not depart from the principles laid down by the Supreme Court in Md.Ayub Khan's case (cited supra) nor does it interpret that decision in the manner suggested by the learned Assistant Solicitor General. On the facts the Supreme Court had arrived at a particular conclusion and it is clear that whether or not there is denial of opportunity would have to depend upon facts of each case and particularly upon the explanation submitted by the citizen who is told that "You appear to have lost your citizenship". If no explanation is furnished by him or if a proper explanation is not furnished by him, then that person cannot be heard to complain that he had been denied the opportunity of substantiating his plea. In other words, it was found in Khwaja Moinuddin's case that there was no plea which was required to be substantiated and this is all that the Supreme Court has observed in that case.

18. In Mohd. Ilyas Vs. Union of India (cited supra) one of the contentions raised before the Supreme Court was that the Government of India was bound to give a personal hearing to those who make representations under Section 9(2) or to afford opportunity to them to

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adduce oral evidence. This question was expressly left open, the Supreme Court observing that on the facts of that case it was unnecessary to decide the point (see para.6 of the report). In paragraph 14 of the report there is reference to the pleas contained in the representation made by the aggrieved person and it is observed that it was not his case that he was compelled or forced to obtain a passport from Pakistan or that he was the victim of any fraud. On these pleas, therefore, the Supreme Court rejected the contention advanced on behalf of the appellant holding that no occasion arose for the Government to give him a personal hearing or to give him an opportunity to adduce oral evidence. It is, thus, clear that in the said decision, on the facts of the case the Supreme Court kept the question open namely., whether the person served with a show cause notice had a right of personal hearing or to adduce oral evidence and merely observed that on the admitted facts of the case and after considering the pleas it could not be said that further opportunity was required to be given to him to substantiate his contention.

19. A reference may also be made to a decision by a Division Bench of the Calcutta High Court in Md.Nazaharul Haque Vs. B.Bagchi, AIR 1974 Cal 29, where after considering a number of authorities including the aforesaid two Supreme Court decisions Laik, J. observed as follows:

> "Para – 23. At any rate, for the purpose of these types of cases as in the instant appeals the following propositions, for which there is ample authority, might be laid down:
>
> (i) The passport obtained by a person from Pakistan would no doubt be evidence that he was a Pakistani national, but that evidence would be subject to the provisions of S.9(2) of the Citizenship Act.
>
> (ii)A Court cannot decide whether an Indian citizen has acquired the citizenship of another country, but the only authority to so decide is the Government of India acting as a quasi judicial tribunal under the provisions of S.9(2) of the Citizenship Act, 1955.
>
> (iii) Section 9(2) of the Citizenship Act and para 3 of the Citizenship Rules are intra vires the Constitution and valid law.
>
> (iv) The proposition that as soon as it is alleged that a passport has been obtained by a person from a foreign Government, the State Government can immediately proceed to deport him without the necessary inquiry by the Central Government, is not correct. It is only after the Central Government has decided the point after inquiry that the State Government can deal with the person treating him to be a foreigner. In dealing with the said question the Central Government would undoubtedly be entitled to give effect to Para 3 in Schedule 3 of the Citizenship Rules and would be entitled to deal with the matter in accordance with the

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other relevant rules framed under the Act, but the question must be first considered by the Central Government. In other words, the decision by the Government of India is a condition precedent in that behalf.

(v) The provision for prescribing rules of evidence, having regard to which the question of acquisition of citizenship of another country has to be determined, clearly indicates that the order is not to be made on the mere satisfaction of the authority without enquiry that the citizen concerned has obtained a passport of another country. The authority has also to determine as to whether the person has voluntarily acquired foreign citizenship.

(vi) The enquiry would be quasi judicial in nature and the citizen concerned must be given due notice of the nature of the action. Reasonable opportunity must be offered to the citizen to convince the authority that what is alleged against him is not true. If a plea is raised by the citizen that he had not voluntarily obtained the foreign passport, the citizen should be afforded an opportunity to prove the said fact. Termination of Indian citizenship does not merely depend upon action of a foreign country in issuing the passport.

(vii) ..... " (emphasis supplied)

20. In S.Mosin Shah Vs. Union Govt. of India, AIR 1974 J&K 48 (FB) it was reiterated that enquiry under Section 9(2) is quasi judicial in its nature and must be based on proper appreciation of the evidence and it must comply with the cardinal rules of natural justice. But it was observed that a personal hearing was not a necessary concomitant of the principles of natural justice. It was clarified that whether or not a personal hearing should be given would depend upon the facts and circumstances of each case. S.Murtaza Fazal Ali, C.J. (as he then was) speaking for the Full Bench referred to Izhar Ahmed's case and Md.Ayub Khan's case (cited supra) and after analysing them observed in paragraph 8 of the report as follows:-

"(1) That R.3 of Sch.III raises a presumption that if a person has acquired a passport of another country, that shall be conclusive proof of the fact that the citizenship was lost.

(2) That before this act can be conclusively proved, the word 'obtained' clearly postulates that the passport must be acquired by free volition or voluntarily.

(3) That the onus of proving the fact that the passport was not acquired voluntarily but under duress or other circumstances is on the citizen concerned and once this plea is raised, it has to be examined by the Central Government while making an enquiry

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under Sec.9(2).

(4) In other words, the expression 'obtained a passport' appearing in R.3 of Sch.III does not include the physical or mechanical act of receiving a passport by a person but postulates the securing of a passport willfully and consciously, knowing full well the consequences of the same. Once this is proved, then the presumption under R.3 will automatically apply to the acquisition of the passport and will become a conclusive proof of the loss of citizenship. Where, however, it is proved that the passport was obtained under duress, compulsion, undue influence, fraud or fear, it will not amount to obtaining the passport within the meaning of R.3, Sch.III and therefore the acquisition of the passport as conclusive proof of the loss of citizenship would not arise....." (emphasis supplied)

21. In a recent decision in Dipali Katia Chadha vs. Union of India, (1996) 7 S.C.C. 432, in a writ petition filed before the Supreme Court under Article 32 of the Constitution, the father of two petitioners had written a letter to the Secretary, Ministry of Home Affairs, Government of India, New Delhi, claiming that both his daughters were entitled to be declared as citizens of India by virtue of Article 5 of the Constitution and Section 4(1) of the Citizenship Act, 1955. In addition to this claim of Indian citizenship, he further stated that they were citizens of Britain by virtue of their birth in England and of Finland by virtue of their mother's nationality. The particulars in regard to their dates of birth, passports, foreign travels, etc. were also furnished in the said letter and it was said that "citizenship status flowing as a birthright can neither be treated as having been, nor deemed to have been, 'voluntarily acquired'." Since both the petitioners held British and Finnish passports, it was contended that foreign citizenship, where it subsists as a birthright, subsists from the day of birth and cannot operate as a disqualification under Section 9 of the Citizenship Act in respect of their claim to Indian citizenship. The Government of India replied by saying that there was no provision in the Citizenship Act for grant of dual citizenship and invited attention to Section 9(1) of the Citizenship Act. It is this reply which prompted the petitioners to move the Supreme Court under Article 32 of the Constitution. A three Judge Bench held as follows :

"Rule 30 of the Citizenship Rules, 1956 provides that if any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purposes of Section 9(2), be the Central Government. It further provides that the Central Government shall have due regard to the rules of evidence specified in Schedule III. That Schedule provides that where it

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'appears' that a citizen of India has voluntarily acquired the citizenship of any other country, it may call upon the person concerned to prove that he has not voluntarily acquired the citizenship of that country. It next provides in para 3 that the fact that a citizen of India has obtained a passport from the Government of any other country "shall be conclusive proof" of his having "voluntarily acquired" the citizenship of that country before that date. Since the petitioners have admittedly obtained passports from the Governments of Britain and Finland, the question is whether they have voluntarily acquired the citizenship of those countries. The presumption, as held by this Court in Izhar Ahmad Khan v. Union of India, is a rebuttable one. The jurisdiction to decide this question vests in the Central Government by virtue of Section 9(2) of the Citizenship Act read with Rule 30 of the Rules made thereunder.

In the context of the above, the questions which arise for consideration are (i) whether the petitioners are entitled to claim citizenship by descent by virtue of Section 4(1) of the Citizenship Act and (ii) if yes, can it be said that the petitioners had "voluntarily acquired" citizenship of another country since they had obtained passports from the Governments of Britain and Finland. Inquiry on the latter aspect would have to be under Section 9(2) of the Citizenship Act by the Central Government. It would be for the Central Government to consider if the refusal to make an option would have any bearing on the questions posed. The reply given by the Government of India dated 7-4-1989 does not show if the point raised was correctly appreciated by the said Government. However, now that the petitioners are majors we direct that these petitions be treated as representations to the Central Government and the latter may decide the questions raised at an early date keeping in mind the written submissions filed in the present proceedings. Counsel for the petitioners will forward a complete set of documents containing copies of the petitions and written submissions along with this order to the Central Government for disposal in accordance with law. The Central Government should briefly indicate its reasons for the conclusions reached so that the order becomes intelligible. If the Central Government decides to inquire under Section 9(2) of the Citizenship Act it will follow the procedure it ordinarily follows while holding such an inquiry." (emphasis supplied)

22. Mr.N.G.R.Prasad, submitted that the appellant's daughter was hardly six years of age when she was taken to Sri Lanka by her grand

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mother, as both her parents were given death penalty, and still she is a minor. There is nothing to show that her mother even wished her to renounce her Indian citizenship by acquiring a Sri Lanka passport. A minor is incapable of changing his or her nationality and the question of cessation of citizenship can be determined only after he or she attains majority. He brought to our notice a decision of the Allahabad High Court in Saghir Ahmad Vs. State, AIR 1961 All 507 where a learned single Judge (W.Broome, J.) held that a minor cannot change his nationality without action being taken or consent being given by his guardian. Where even though the minor's parents were living in India, and were Indian nationals, the minor was sent to Pakistan, but returned to India on the basis of a passport and a visa, and there was nothing to show that his father even wished him to renounce his Indian nationality, the declaration which the minor must have made for obtaining the passport and the visa was absolutely invalid and ineffectual and can have no value in the eye of the law, since it was made at a time when he was still a minor and legally incapable of changing his nationality of his own accord. Therefore, the minor could not be said to have renounced his Indian citizenship when he reentered India on the passport. His subsequent deportation to Pakistan for his overstay in India, could not possibly have the effect of depriving him of his citizenship. When therefore he re-entered India for the second time after deportation, without a passport, he could not be said to have committed an offence under the Foreigners Act. The learned Judge also held that Clauses 3 and 5 of Schedule III Rule 30 of Citizenship Rules making the obtaining of a foreign passport a conclusive proof of acquisition of citizenship of another country are ultra vires Article 19(1)(e) of the Constitution. However, this part of the judgment of the learned Judge is obviously no longer a good law in view of the decision of the Supreme Court in Izhar Ahmed's case (cited supra).

23. Mr.N.G.R.Prasad next relied upon the decision of a Division Bench of the Gujarat High Court in Yusuf Ibrahim Vs. State of Gujarat reported in AIR 1962 Guj. 194. In that case the petitioner was born in India in 1938 and was educated there for sometime, went to Pakistan in 1953 allegedly at the instance of some one else. He returned to India on a Pakistan passport in 1954 and was residing in India when in pursuance of an order passed in 1960 by the State Government declaring him to be a foreigner, he was deported. The petitioner applied for a passport to come to India within a fortnight of his reaching Pakistan and came again to reside in India. He filed a petition under Article 226 of the Constitution praying for a writ of prohibition restraining the State from expelling him on the expiry of visa. It was contended by the State that the petitioner had voluntarily migrated to Pakistan and had renounced his citizenship. There was no order passed by the Central Government under Section 9(2) of

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the Citizenship Act declaring him as a foreigner. The Bench held that -

> "(i) that the petitioner being a minor at the time of migration to Pakistan could not be said to have voluntarily migrated to Pakistan so as to make Article 7 of the Constitution applicable to his case.
>
> (ii) As petitioner's entry into India on the strength of a Pakistani passport was prima facie proof that he was a foreigner, it was for him to establish that he was not a foreigner and to rebut the prima facie case against him that he was a foreigner. But as he was hardly 16 years of age when he applied for the passport in Pakistan his declaration could not be said to be of such a binding nature as to deprive him of his rights as a national of India. His very conduct in applying for passport soon after he went to Pakistan would itself be evidence of rebuttal against the presumption that he had gone to Pakistan with the desire or intention to abandon his citizenship of India.
>
> (iii) He could not be deemed to be a foreigner even under the Foreigners Laws (Amendment) Act 1957 because the question of renunciation of a citizenship would have to be decided by the Central Government, as a Tribunal under S.9(2) of the Citizenship Act of 1955, which would have the exclusive jurisdiction to determine that question. In the absence of any order by the Central Government declaring the petitioner a foreigner, the order declaring him a foreigner passed by the State Government was premature. " (emphasis supplied)

24. Mr.N.G.R.Prasad also placed heavy reliance upon the "Convention on the Rights of the Child " adopted by the UN General Assembly on 20.11.1989, which is also ratified by India, and contended that the State is obliged to respect the right of the child to preserve his or her identity including nationality as recognised by law and a child cannot be separated from his or her parents against his or her will except in accordance with applicable law and procedure and only when such separation is necessary for the best interests of the child. He submitted that in the absence of domestic law on the particular aspect these conventions and norms as ratified by India can be relied upon for the enforcement of the fundamental rights. He particularly placed reliance on Articles 8 and 9 of the said Convention which read as follows:-

> "Article 8
>
> 1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
>
> 2. Where a child is illegally deprived of some or all of the

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elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing speedily his or her identity.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interest of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.

3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.

4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned." (emphasis supplied)

25. It is not necessary for us to express any opinion on the correctness of the various pleas raised by Mr.N.G.R.Prasad, as it is for the authority invested with power under Section 9(2) of the Citizenship Act to determine that question, if it is raised. Thus, the question as to whether minor Megara has lost her citizenship of this country and has acquired the citizenship of Sri Lanka has to be tried by the Central Government in accordance with Section 9(2) of the Citizenship Act. Till the status of her citizenship is determined by the Central Government

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under Section 9(2) she does not cease to be the citizen of this country and will be entitled to enter and live in this country. The question whether such enquiry could be held during the minority of the Megara is expressly kept open.

26. Mr. P. Wilson also made a submission before us, for the first time, that the petition is not properly framed as required under Order XXXII, Rule 1 of the Code of Civil Procedure. No such objection was raised by the respondent before the learned single Judge or in the counter, and in any event, the natural guardian of the minor Megara is the appellant and therefore, we are not inclined to entertain such a submission made at this belated stage.

27. In the result, we direct the respondent - Union of India to issue an entry permit to the appellant's daughter, within a period of four weeks from the date of receipt of a copy of this order, to enable her to come to India. The writ appeal is allowed. No costs. Consequently, M.P. No.1 of 2006 is closed.

ab/sm

Sd/
Asst. Registrar

/true copy/

Sub Asst.Registrar

To

1. The Secretary to Govt,
Ministry of External Affairs,
Government of India,
New Delhi.

+ 3 CCs to M/s S. Rajendran Advocate sR 13981
+ One cc to M/s. P. Wilson, ASGI (SR 14127)
RS (co)
sg 21/4/07

W.A. No.1599 of 2006

7.3.2007.

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